

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





76-7523

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-X

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs, Appellants,

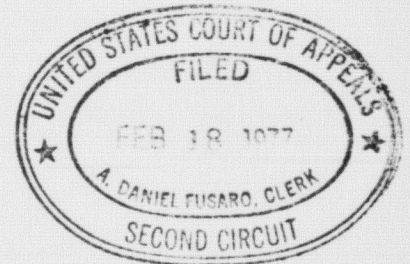
-against-

MESSERS. GRENITO, PETERSON, TRAPANI,  
WALKER, ROSE, YACHNIN and WEXNER,  
Constituting the Board of Zoning  
Appeals of the Town of Hempstead,  
State of New York, and THE FOURTH  
OCEAN PUTNAM CORPORATION, and THE  
TOWN OF HEMPSTEAD,

Defendants, Appellees.

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APPEAL FROM  
UNITED STATES  
DISTRICT COURT  
FOR THE EASTERN  
DISTRICT OF NEW  
YORK - DOCKET  
NO. 76-7523



REPLY BRIEF FOR APPELLANTS

RUTH RADOW and SEYMOUR RADOW  
Pro, Se

50 Tioga Avenue  
Atlantic Beach, N.Y. 11509



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### POINT I

The defendants-appellees' answer to their first question clearly reveals the fact that they have not taken judicial notice of the vitally important technical data in the seventy page report published by the U.S. Army Corps of Engineers entitled Flood Plain Information, South Shore of Nassau County, L.I., N.Y. 1971.

The complete record of the instant case is devoid of any admission by the defendants-appellees that said report exists.

The members of the Board of Zoning Appeals attempt to persuade the Court that the fact the Town of Hempstead has "commenced participation under the provisions of the National Flood Insurance Act", and "by virtue of its entry into the program", has insured the safety of the lives of its citizens! (Ref. Appellees brief p.3)

No insurance policy will secure the safety of life when some fifty thousand residents attempt to evacuate Long Beach Island via the three bridges to the mainland when warned of the approach of a hurricane. An increase in the density of population, which the members of the Board of Zoning Appeals have approved, will add to the hazards for all residents of Atlantic Beach attempting to evacuate. (170 units to replace 100 units - ref. appellees appendix p. 3b.)

Publication of technical data specifically describing the flood levels, particularly storm surges accompanied by the pounding



action of waves during hurricanes, present new "problems" and "new conditions" for Town Officials who have been empowered by the State to regulate and restrict the use of land in high hazard flood areas so as to promote the health, safety and welfare of the residents in those areas. (Sec. 261,262,263,267 New York Town Law)

Congress has recognized the "problems" which have been created "largely as a result of the accelerating development of, and concentration of population in areas of flood hazard"; and Congress also found that the "annual losses throughout the Nation from floods are increasing at an alarming rate". (Flood Disaster Protection Act of 1973, Sec. 2 (a) (1)). In the same statute, Congress declared that "the Nation cannot afford the tragic loss of life caused annually by flood occurrences" (id. Sec. 2 (a) (5)); and stated that a purpose of the Act, is to "require local communities, as a condition of future Federal financial assistance, to participate in the Flood Insurance Program and to adopt flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses (id. Sec. 2 (b) (3)).

Clearly Congress intended that local communities which indicated a desire to "participate in the program" to adopt "flood plain ordinances". As we stated in our brief on appeal the tidal surge during a Standard Project Hurricane would be 12.3 feet above mean sea level and would inundate all of the barrier island where Atlantic Beach is located (P. 18).



The Army Corps of Engineers states in its report (P.8), "wave runup to elevations higher than the solid water level" (i.e., higher than 12.3 feet during a Standard Project Hurricane) "is a significant factor to expose locations adjacent to areas of fairly deep water. Waves up to thirty feet have been reported off the south shore of Long Island."

The plot plan of the proposed hotel, p. 1b of the appellees' appendix reveals the close proximity to the Atlantic Ocean of the approved hotel. The beach between the structure and the ocean is devoid of sand dunes.

The Corps also states in its report, "the Town of Hempstead building code calls for a minimum street elevation of 7.5 feet above mean sea level and a minimum first floor level of 9.0 feet above mean sea level . . ." "New building construction in the Town of Hempstead, since implementation of the minimum elevation requirements in the Building Code, is essentially free from flood damage for an Intermediate Regional Tide, but would be subject to flooding under Standard Project Tide conditions. (id. P. 19)

Fifty years ago, the U.S. Supreme Court anticipated that there would be "problems" which "will continue to require additional restrictions in respect of the use and occupation of private lands in urban communities"; and "(while) the meaning of Constitutional guarantees never varies, the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their



operations." Euclid v. Ambler, 272 U.S. 365, 386, 387 (1926) (emphasis added).

The Town of Hempstead and the members of the Board of Zoning Appeals have been empowered by State statutes to restrict the use of land in Atlantic Beach so as to secure safety from flood and conserve the value of buildings and promote the health, safety and welfare of the residents in the community. They have been granted the power to require "additional restrictions", "to meet the new and different conditions" revealed in the Corps of Engineers report.

Instead, the members of the Board of Zoning Appeals in effect deny that there are new conditions or new problems, and defend their actions in approving an increase in the density of population by referring to past determinations which would make a denial of Fourth Ocean Putnam's appeal for a hotel "a complete turn-about". (Defendant-appellees' appendix P. 50b).

The members of the Board also find the "probable development" of the south side of Ocean Blvd. is that of "cabana clubs, beach resort uses and hotels, and that the district is suitable for such uses." (id P. 50b) (emphasis added)

We respectfully contend that the actions taken by members of the Board in the instant case, and the compulsion expressed to continue approving construction of more hotels in the high hazard flood zone, are not in compliance with the purposes and intent of Congress set forth in the Flood Insurance Act as amended.



Judge Suozzi acknowledged that: "Eligibility depends on legislative enactment of standards for land use . . .". However, he did not determine whether the Town Board had enacted any land use restrictions for land in the high hazard area. The Town has submitted no evidence whatsoever to the Court that any changes in the zoning regulations are even being contemplated for the exposed oceanfront.

The defendants-appellees' brief states that Judge Suozzi found that they "neither varied nor altered the provisions of the National Flood Insurance Act" (brief P. 5). Justice Suozzi did not scrutinize the Act in order to ascertain the true sense and meaning of Congress. His opinion fails to reveal a full interpretation and construction of the F.I.A. (appellants appendix P.13)

The members of the Board of Zoning Appeals and the Town of Hempstead have attempted to persuade the Court that they have complied with the intent and purpose of Congress as set forth in the F.I.A. Both the Appellees and Justice Suozzi have completely ignored the technical data which is incorporated in the Army Corps of Engineers Report.

We respectfully contend that the appellees have failed to prove that they have NOT acted in contravention of the National Flood Insurance Act of 1968 as amended.



### CONCLUSION

The Town Attorney in his conclusion on behalf of Messrs. Grenito, et al., constituting the Board of Zoning Appeals of the Town of Hempstead, State of New York, and the Town of Hempstead, has stated "the order of Judge Weinstein granting the motion for summary judgment on the ground that there is no genuine issue as to any material fact, there is no Federal question and that the defendants-appellees are entitled to a judgment as a matter of law, should be affirmed."

The material allegations in our brief appealing the District Courts dismissal of this case were based solely upon the issues we personally and very carefully raised at hearings before the members of the Hempstead Board of Zoning Appeals, and which are included in the public record of those hearings. (May 30, 1974, November 27, 1974).

The memoranda we submitted at the public hearings before the members of the Board of Zoning Appeals on May 30, 1974 and November 27, 1974 clearly state that "my constitutional property rights would be adversely affected if this precedent-setting application is granted." (May 30, 1974 p. 2 Exhibit W pt. II). "I have submitted this testimony (November 27, 1974 P. 8 Exhibit II) in order to protect my constitutional right for equal protection under the 14th Amendment, to enjoy my home and be protected against any deprivation of that civil right - through actions taken under State Law (Lynch v. Household Finance Corp. 405 U.S. 538 at 552."



Nov. 27, 1974 P. 1 "Atlantic Beach is in a special "flood hazard area." Adding additional all year round residents in a special flood hazard area will make evacuation, in case of flood, more difficult, more dangerous, and will add greater risk to the rescue program. The words "secure safety from flood" is written in our State Laws effective 1956 . . . P. 2. . . Before 1930, when the original summer hotel was built, 3 blocks from the present proposed site, there was not the engineering and scientific data that we know now about the danger from flood to the Atlantic Beach area."

"Not only did New York State consider the need to protect people in a flood plain area but the fundamental purpose of empowering towns, by New York State, to regulate and restrict the use of land and promote the health, safety and welfare of residents was set forth in the Zoning Enabling Act (New York Town Law, section 261, 263). There is no doubt that the fundamental purpose of zoning is to promote the health, safety and welfare of residents."

"The Town of Hempstead, in turn, has made it mandatory for the Board of Zoning Appeals to uphold the purposes of zoning in New York Town Law (Sec. 261 and 263)."

"Article 12 of the Hempstead Building Zone Ordinance states that (P.3) the Board of Zoning Appeals shall determine . . . Sec. 2-1. o B (a) 3" That the safety, the health, the welfare, the comfort, the convenience or the order of the Town will not be adversely affected by the proposed use and its location' and". . .



"SHALL give consideration to Sec. 2-1.0 B (b) 9" whether a hazard to life, limb or property because of fire, flood, erosion or panic may be created by reason or as a result of the use, or by the structures to be used therefore or by the inaccessibility of the property or structures thereon for the convenient entry and operation of fire and other emergency apparatus or by the undue concentration or assembly of persons upon such plot". (as noted in the previous hearing, Atlantic Beach is part of an island. All three bridges leading out of Atlantic Beach are draw bridges - all are in a flood plain area. Bridges have gotten stuck when opened.)"

"Scientific findings have been promulgated by the Army Corps of Engineers with special reference to this area, with regard to the danger of flood in the Atlantic Beach area."

"Article 12 provides that the Board of Zoning Appeals SHALL uphold the purposes of zoning in New York Town Law (Sec. 261 and 263) ". . . . . P.4." The New York State Legislature reinacted the purposes of zoning (Sec. 7-704 purposes in view formerly 177 Village Law ) 1972 effective 1973. Again it was stated as one of the purposes . . . . 'to secure safety from floods.' In addition to the State, Town and Village Law, the Federal Government recognized the need to protect our shore line areas. In 1968 Congress enacted the National Flood Insurance Act which constricts building in a flood plain area to protect the health, safety and welfare of residents in a flood plain."



"Atlantic Beach is in a flood plain as warned by the United States Army Corps of Engineers in their booklet "Tidal Flood Plain Information South Shore of Nassau, Long Island, New York, June 1971, Plate 11, Page 66." . . "The aforementioned Zoning Enabling Act requires that heed be paid to such warning. I know of no law which empowers the Hempstead Town Board or the Board of Zoning Appeals to ignore such a warning."

"Without a judicial determination by the courts, your honorable Board would be well advised NOT to accept any or all opinions of local, State or Federal administrations with regard to the legislative intent and provisions of State and Federal laws which have been enacted to protect persons from the dangers of floods. Thus regardless of the fact that those responsible for using the taxpayers money to approve subsidy for insuring new construction in flood plain areas - by such approval, in NO way exempts the Hempstead Board of Zoning Appeals from complying with State Statutes which mandates land uses to 'secure safety from flood',. Presumably the Board of Zoning Appeals has an opportunity to gather first hand information regarding past floods and potential future flooding."

"The State objectives were upheld by the United States Supreme Court, April 1, 1974 in the Belle Terre decision. One of the fundamental basis upon which Justice Douglas based his opinion upholding Belle Terre's Ordinance was his finding that said ordinance 'bore' a rational relationship to a 'permissible' State objective. Said 'objective' is set forth in the New York State Zoning Enabling Statutes (New York Village Law, Sec. 7-700,"



" 7-704) The fundamental purposes of zoning in the two named sections of Village Law are found in Sec. 261 and 263 New York Town Law. They upheld the purposes of zoning set forth in New York State Enabling Acts."

"The latest decision of the United States Supreme Court becomes part of the body of constitutional law. Precedents set by the Supreme Court are binding on all lower courts, Federal and State." (1) The Constitution of the United States with Case Summaries Edited by Edward Conrad Smith. Published by Barnes and Noble, Inc. 9th Edition 1972."... (The Village of Belle Terre v. Boraas 416 U.S. 1 1974) . . Page 8. "I respectfully remind the Board that the primary fundamental purpose of restricting the use of land is to protect the health, safety and welfare as first upheld by the U.S. Supreme Court in Euclid v. Ambler (272 U.S. 365, 1926) in 1926, a landmark decision which has been upheld by the U.S. Supreme Court in the Village of Belle Terre v. Boraas, Supra. It is especially noteworthy that not only the majority of the Court but Mr. Justice Douglas in his opinion in that case also upheld the principle of Euclid v. Ambler". May 30, 1974 P. 2.

"Granting of this application for the land to be used for a hotel will adversely affect me and the residents of the area because it will cause an overcrowding of land on a flood plain and an undue concentration of assembly of persons when such plot and prevent the orderly and reasonable use of adjacent resident properties (Board of Zoning Appeals Hearing May 1962, case No. 447, decided July 26, 1962 and decision upheld 21 A.D. 2d 875, 251, N.Y.S.



794." (to construct a hotel on portions of the same site as the proposed Fourth Ocean Putnam hotel.)

We very respectfully pray that we shall not be further penalized for having accepted the advice of the attorney we retained to prepare and file our complaint in the District Court. He had NO part whatsoever in the preparation or presentation of our testimony, exhibits and memoranda presented at public hearings held by the members of the Board of Zoning Appeals. He was not even present at those hearings.

Although we furnished him with a complete copy of our testimony and memoranda and the members of the Board of Zoning Appeals sent to his office copies of the entire public record, he omitted most of the fundamental issues we had so carefully raised at the public hearings; issues which were based on our rights under the United States Constitution and specific State and Federal Laws. These issues were not made a part of our complaint.

After he had filed our answer to the Board of Zoning Appeals motion (to dismiss) we dismissed our attorney in December 1975. When we had carefully studied the booklet "Appeals to the Second Circuit", 1975 recommended to us by the Clerk of this Court, we fully realized we were in danger of being deprived of our right to place these fundamental issues, the bases of the controversy, before the District Court at a full hearing on the merits of the case.



We pray for an "equitable interpretation" of 42 U.S.C. 1983 and 28 U.S.C. 1343 (3); that the errors and omissions manifest in our complaint filed in the District Court will not be the bases for denying our plea for a trial on the merits of the case. (Ref. 1 Joseph Story, Commentaries on Equity Jurisprudence, 9 (1836) Reprint Edition 1972 by Arno Press Inc. - American Law : The Formative Years. "(It) is the part of a Judge to look to the objects of the Legislature, and to give such a construction to the words, as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of Equity, as contradistinguished from a strict adherence to the mere letter of the law.")

As an example of the important "omissions" in our complaint, we respectfully call the Court's attention to the fact that it was the Town Attorney, representing the members of the Board of Zoning Appeals, not our attorney, who informed the District Court: "Plaintiffs herein appeared before the defendants Grenito, et al constituting the Board of Zoning Appeals of the Town of Hempstead and vigorously apposed the application of the co-defendant herein, Fourth Ocean Putnam Corporation, for certain special use permits and variances." (P. 56 appendix).

We respectfully claim that after judicial scrutiny by the District Court of the entire record we made before the members of the Hempstead Board of Zoning Appeals, at State mandated hearings, we will be able to prove that we had carefully established legal bases for the material allegations set forth in our brief on appeal.



The United States Supreme Court has held that: "(It) is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." WARTH v. SELDIN, 422 U.S. 490 (1975), 43 LW 4906, 4909.

We respectfully contend that if granted the "opportunity" to amend our complaint or submit an affidavit, we shall be able to establish our standing to commence a civil action in District Court under 42 U.S.C. 1983 and 28 U.S.C. 1343 (3).

Respectfully submitted,

RUTH RADOW and SEYMOUR RADOW